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Department Of Health And Human Services

Indian Health Service

Notice of a Project Waiver of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 (ARRA)

AGENCY: Indian Health Service (IHS), HHS.

ACTION: Notice.

SUMMARY: The IHS is hereby granting waivers of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(1) [applying the Buy American provision would be inconsistent with the public interest] to the Alaska Native Tribal Health Consortium (ANTHC) for the specific Alaska projects listed in this notice for the purchase of a foreign manufactured equipment to be installed on those sanitation facilities construction projects. This is a project specific waiver and only applies to the use of the specified product for the ARRA projects listed in this notice. Any other ARRA recipient that wishes to use the same product must apply for a separate waiver based on project specific circumstances. Based upon information submitted by the ANTHC professional engineering staff, it has been determined that applying the Buy American provision would be inconsistent with the public interest. The IHS is making this determination based on the review and recommendation of the IHS Alaska Area Office. This action permits the purchase of a foreign manufactured item for the projects specified in this notice.

Waivers are granted for the ARRA funded ANTHC projects in these Alaska communities: City of Angoon for water treatment plant media filters, City of

Buckland for Flygt submersible wastewater pumps and appurtenances, City of Chignik for water treatment plant measuring equipment, City of Chuathbaluk for Grundfos pumps for its water and sewer systems, City of Deering for Grundfos pumps for its infiltration gallery and filtration plant, and City of Hooper Bay for Toyotomi Fuel Lift pumps for its existing Toyotomi fuel oil fired hotwater heaters.

DATES: Effective Date: Upon publication

SUPPLEMENTARY INFORMATION: In accordance with ARRA Section 1605(c) and Section 176.80 of the rules of the Office of Management and Budget (OMB) (2 C.F.R. 176.80), the IHS hereby provides notice that it is granting a limited waiver of the requirements of section 1605(a) of Public Law 111-5, Buy American requirements, based on the public interest authority of section 1605(b)(1), to allow the use of non-domestic iron, steel, and manufactured goods in eligible sanitation facilities construction projects.

ARRA 1605(a) prohibits the use of Recovery Act funds for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States, or unless a waiver is granted by the head of the Federal department or agency. ARRA 1605(b) provides that the Buy American requirement shall not apply in any case or category in which the head of a Federal department or agency finds that: (1) Applying the Buy American requirement would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the U.S. in sufficient and reasonably available quantities or of satisfactory quality; or (3) inclusion of iron, steel, and manufactured goods will increase the cost of the overall project by more than 25 percent. ARRA 1605(c) provides that if the head of a Federal

department or agency makes a determination under 1605(b), the head of the department or agency shall publish a detailed written justification in the Federal Register. The finding relevant to this waiver is at ARRA 1605(b)(1), that applying the Buy American requirement would be inconsistent with the public interest.

In drafting this waiver, IHS considered the fact that these types of components are used in State of Alaska and Environmental Protection Agency (EPA) funded projects as well as those funded by the IHS. The State's remote maintenance worker program, which provides technical assistance to village operators on the operation and maintenance of their systems, is dependent on the standardization of those items since almost all travel to assist Native village system operators must be accomplished on small single engine aircraft with limited cargo capacity. The disproportionate cost and delay that would be imposed on projects if the IHS did not issue this waiver would jeopardize project completion and related jobs in remote areas including Alaska villages where the only means of transporting such components is by air. In addition, the majority of Alaska sanitation facilities construction projects occur in remote locations, the summer construction season is very short, and water and wastewater systems and their component equipment must be reliable during the long Alaska winters with its sub-zero temperatures.

Based on the findings discussed above and pursuant to Section 1605(c), the IHS is hereby granting waivers to the ANTHC for the projects listed above. The IHS has determined that imposing the Buy American requirement for the items incorporated into the listed projects would be inconsistent with the public interest and particularly with ARRA's directives to ensure expeditious construction consistent with prudent management. Accordingly, IHS is hereby

issuing waivers from the requirements of ARRA Section 1605(a) to ANTHC for the components described for the listed projects.

The ANTHC must retain relevant documentation as to these project items in their project files, including the types and/or categories of items to which this waiver is applied, the total cost of components covered by the waiver for each type or category, and the calculations by which they determined the total cost of materials used in and incorporated into the project.

The IHS has determined that the ANTHC's waiver request is late, but for the reasons set forth below the IHS will evaluate the request as if it were timely made even though the request was made after the project execution. Pursuant to the OMB guidance at 2 CFR 176.120, the IHS may determine that the ANTHC's request can be evaluated as timely if the recipient demonstrates why it could not request the determination before making the obligation or if the need for a waiver was not reasonably foreseeable. For those waivers which do not have a reasonably foreseeable basis for lateness, but for which the waiver basis is valid and there is no apparent gain by the ARRA recipient or loss on behalf of the government, then IHS will still consider granting the waiver.

The waiver request was not submitted earlier because of extensive legal discussions regarding waiver qualifications and whether Tribal community systems were considered public works. Tribal land status under the Alaska Native Claims Settlement Act is complex, and differs from that of Tribal lands on lower 48 reservations, and could have affected the applicability of Buy American provisions.

Delaying ongoing construction projects of needed water and wastewater systems will create public health implications in remote Alaska communities and there is no indication that ANTHC failed to request a waiver to avoid the requirements of the ARRA. In the interest of the Alaska Natives benefitting from the sanitation facilities constructed in the communities in this notice, the ANTHC decided to request this waiver. Accordingly, the IHS will evaluate the request as if it were timely made.

The IHS has determined, based on its 50-year experience constructing sanitation facilities for Alaska Native communities and the professional engineering judgment of the IHS Alaska Area Office, that it is in the overall public interest and benefit to incorporate the items in the listed sanitation facilities construction projects.

Further, as described above, in some cases projects are jointly funded by IHS and the EPA. The waivers apply to the listed projects regardless of whether the funding for the projects originated from IHS or EPA.

Authority: Public Law 111-5, Section 1605.

For Further Information Contact: Ms. Betty Gould, Regulations Officer, 801 Thompson Avenue, TMP, Suite 450, Rockville, MD 20852-1627; call non-toll free (301) 443-7899; send via facsimile to (301) 443-9879; or send your e-mail requests, comments, and return address to: Betty.Gould@ihs.gov.

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